

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. Section 160(c))	WC Docket No. 04-440
)	
In the Matters of)	
)	
Qwest Petition for Forbearance Under 47 U.S.C. Section 160(c) From Title II and Com- puter Inquiry Rules With Respect to Broadband Services)	
)	WC Docket No. 06-125
Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. Section 160(c) From Title II and WC Docket No. 06-125 Computer Inquiry Rules With Respect to its Broadband Services)	
)	
Petition of BellSouth Corporation for Forbear- ance Under 47 U.S.C. Section 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Services)	

TELECOM INVESTORS' COMMENTS IN SUPPORT OF EXPEDITED MOTION

Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

*Attorneys for Columbia Capital and M/C
Venture Partners*

August 13, 2007

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Columbia Capital and M/C Venture Partners, (together the “Telecom Investors”) by their counsel, respectfully submit these comments in the above-captioned proceedings.

SUMMARY AND INTRODUCTION

The Telecom Investors are a group of investment firms that, since enactment of the Telecommunications Act, collectively have invested several billion dollars in companies that compete with incumbent cable and telecommunications companies. The past ten years have been challenging for the Telecom Investors and their contemporaries, given the unsettled nature of the underlying regulatory scheme. In spite of this, the Telecom Investors have generally been confident throughout that time that the Commission has been committed to furthering competition in the telecommunications industry in some fashion or another. That confidence, however, was shaken in the wake of recent FCC forbearance decisions,¹ and would be further eroded if the Commission were to grant the Pending Petitions, further undermining the growth of competition Congress mandated in passing the 1996 Act.

An important overall requirement of Section 10 of the Communications Act² is that forbearance promote competitive market conditions and enhance competition.³ However, just the opposite will occur if the RBOCs are granted the relief they seek. Rather than enhancing competition, the Commission will solidify an entrenched duopoly that will permanently resist competition and repel further investment in competitive alternatives. The Commission is well aware that incumbent cable and wireline providers control a vast majority of the local telecommunications market, and the first mover advantages that both enjoy. It is only through loop/transport unbun-

¹ See e.g. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005) (“*Omaha Order*”).

² 47 U.S.C. § 160.

³ *Id.* § 160(b).

ding and disciplined special access rates that new entrants can hope to carve out a place in the market. Without these, there is little hope of any significant competition for the future.

The Commission is long on record as having grave concerns about the dangers of duopoly, agreeing with economists that duopolies in any telecommunications market tend to have significant anticompetitive effects and to generate supracompetitive rates. Already, Verizon, for example, has raised rates notwithstanding the purported competition that it must contend with. Given this, great predictive powers are not necessary — the Commission need only extrapolate from the present to envision the damage to competition, investment and the public interest if it grants forbearance.

Section 10(a) of the Act contains three prongs, each of which must be met in order for the Commission to forbear from enforcement of a rule or provisions of the Act. If so, the effective result is a finding of non-dominance in the market for the products or services at issue. The RBOCs have not — indeed cannot — establish that they have met this standard. They clearly remain dominant in the local exchange market, especially for residential and small business customers, and remain by far the major supplier of last-mile connectivity for all commercial establishments.

It is clear that the RBOCs retain their dominance in virtually all areas, as the Commission recognized in the Verizon-MCI merger and the AT&T Mergers. At that time, both the Commission and the Department of Justice expressed concerns that competition was insufficient to discipline the substantial market power of the largest RBOCs. Threats to competition are great enough as it is. The Commission should not increase them by granting forbearance.

The Telecom Investors, pursuant to the Commission's Public Notice,⁴ urge the Commission to avoid compounding the mistake of its "deemed grant" of Verizon's forbearance petition and deny the "me-too" petitions of AT&T, Qwest, BellSouth and other ILECs (the "Pending Petitions")⁵ requesting that the Commission forbear from application of Title II and *Computer Inquiry* requirements to the same extent that Verizon obtained forbearance when the Commission indicated that Verizon's petition was "deemed granted."⁶ As explained by Movants XO, Covad and Nuvox,⁷ Verizon's original petition was without merit and should have been denied. Similarly, the Telecom Investors support the challenge to the "deemed grant" currently pending before the D.C. Circuit and do not concede that Verizon's Petition was granted.⁸ The Commission is well aware, however, that a decision from the Court is unlikely before the passing of the statutory deadlines for the Pending Petitions. It is imperative that the Commission avoid resorting to the "deemed granted" provision of Section 10(c) in disposing of the Pending Petitions and reject the concept that its "deemed grant" of the Verizon petition provides any basis for the Commission to grant the remaining RBOCs similar relief.

⁴ *Wireline Competition Bureau Seeks Comment on The Motion of Covad Communications Group, Nuvox Communications, Inc., and XO Communications, LLC for Expedited Order on Verizon Petition for Forbearance*, Public Notice, WC Docket 04-440, DA 07-3473, rel. July 30, 2007.

⁵ *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance Under 47 U.S.C. Section 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, Public Notice, WC Docket No. 06-125, DA 06-1464, released July 19, 2006; *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance Under 47 U.S.C. Section 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, Public Notice, WC Docket No. 06-125, DA 06-1490, rel. July 21, 2006.

⁶ *Verizon Telephone Companies' Petition for Forbearance From Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted By Operation of Law*, News Release, WC Docket No. 04-440, rel. March 20, 2006.

⁷ *Motion for Expedited Order on Verizon Petition for Forbearance*, WC Docket No. 04-440 (filed July 25, 2007) at pp. 6-8.

⁸ *See Sprint Nextel Corp. v. FCC*, Case No. 06-1111 (D.C. Cir.).

In evaluating the Pending Petitions on their merits, the Commission is obligated to deny those petitions. At the same time it considers the Pending Petitions, the Commission should take the opportunity to undo the misguided “deemed grant” of Verizon’s petition that suffers from the same defects as the Pending Petitions.

I. THE “DEEMED GRANT” OF VERIZON’S PETITION HAS NO PRECEDENTIAL VALUE

The Commission should reject the Pending Petitions’ claim that the earlier Verizon “deemed granted” forbearance is a mandate that the Commission immediately grant the other RBOCs the same relief.⁹ To the extent the Commission treats Verizon’s petition as “deemed granted,” that does not establish any precedent or policy because the Commission failed to issue a written decision explaining its reasons for granting the petition. The Commission made no findings that Verizon’s petition satisfied the statutory criteria set forth in Section 10. It cannot logically rely on the absence of findings in the previous case to justify relief in the pending cases.

Nor is there any basis to the claim that the Commission’s treatment of Verizon’s forbearance petition as “deemed granted” affords Verizon an unfair competitive advantage *vis-à-vis* the other RBOCs.¹⁰ With the exception of the legacy AT&T and MCI, the RBOCs do not compete in each others’ regions.

Qwest’s request that the Commission should, in light of its treatment of the Verizon forbearance petition, grant the petition as a ministerial act is flatly unlawful.¹¹ Section 10(c) provides that “the Commission may grant or deny a petition in whole or in part and explain its decision in writing.”¹² Accordingly, rather than rubber-stamping a “me-too” request, the Com-

⁹ AT&T Petition at 6; BellSouth Petition at 9; Qwest Petition at 7.

¹⁰ BellSouth Petition at 9.

¹¹ Qwest Petition at 7.

¹² 47 U.S.C. § 160(c).

mission must provide a written decision that thoroughly explains how the Petitions meet or do not meet the standards for forbearance under Section 10(a). The plain language of Section 10 requires the Commission to issue a decision on the merits.¹³

As suggested by Movants, the Commission should take this opportunity to examine the forbearance it claims was granted to Verizon and either rescind it or, at a minimum, clarify its scope. By clarifying the scope of the forbearance “deemed granted” to Verizon, the Commission may narrowly tailor an appropriate forbearance for all the RBOCs, assuming any forbearance is justified. This would be more consistent with the statutory requirements than letting the unlawful forbearance the Commission claims was “deemed granted” to Verizon steer important policy decisions.

There is little dispute that the Commission may rescind, modify, or clarify its treatment of any forbearance “deemed granted” to Verizon in whole or in part. Section 10 of the Act provides for forbearance from application of FCC regulations or provisions of the Act, but does not rescind or repeal the underlying requirements. Thus, even to the extent the “deemed grant” of Verizon’s petition granted Verizon substantive relief, the forbore FCC regulations and statutory provisions remain in effect and may be reapplied prospectively when circumstances warrant.¹⁴

The Commission has conceded this point, arguing in the D.C. Circuit that after a “deemed grant of a forbearance petition [it] retains the authority thereafter to deny or grant the petition in whole or in part.”¹⁵ In fashioning this argument, the Commission recognized that

¹³ See *AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004);

¹⁴ Qwest concedes that the statute does not prohibit the Commission from re-imposing regulations that were the subject of a previous grant of forbearance under Section 10. See Brief of Qwest, Inc., *Qwest v. FCC*, DC Cir. 05-1450, at p. 24 n. 17 (August 7, 2006).

¹⁵ Brief for Respondents, *In re Core Commc’ns, Inc.*, No. 04-1368 (D.C. Cir. Sept. 2, 2005) at p. 31.

“Congress viewed the deadline and the ‘deemed granted’ provision simply as mechanisms to force timely action by the Commission, and not as process for wholesale revision of the Act through inaction.”¹⁶ Further, in the *Omaha Order*, the Commission expressly stated that it retained the power to “reconsider” or modify the relief granted to Qwest if justified by new information.¹⁷ This reading is also consistent with the Commission’s interpretation of an analogous provision of the Act. Section 204(a)(2)(C)(3) provides that a LEC tariff filed on 7 or 15 days notice shall become effective and be “deemed lawful” if the Commission does not suspend the tariff within those time periods.¹⁸ However, the Commission has determined that it may later find the tariff unlawful notwithstanding that it was previously “deemed lawful.”¹⁹

Accordingly, the Commission may rescind, modify, or clarify its treatment of Verizon's forbearance petition as “deemed granted” under Section 10(d).

II. THE RBOC PETITIONS SHOULD BE DENIED UNDER SECTION 10(A)(1) AND 10(A)(2)

Section 10(a) states that the FCC “shall forbear from applying any regulation or any provision [of the Act] ... to a telecommunications carrier or telecommunications service” if it determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

¹⁶ *Id.* at 32.

¹⁷ *Omaha Order*, ¶ 84 n.204.

¹⁸ 47 U.S.C. § 204(a)(2)(C)(3).

¹⁹ *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, ¶ 19 (1997).

(3) forbearance from applying such provision or regulation is consistent with the public interest.²⁰

In making the determination under subsection (a)(3), the FCC also must “consider whether forbearance from enforcing the provision ... will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers of telecommunications services.”²¹ All three prongs of this standard must be afforded a plain meaning interpretation²² and all three must be satisfied before the Commission grants a petition for forbearance. While the RBOC petitions each fail on all three prongs, the most obvious defect are their failure to establish the presence of real last mile competitive facilities.

Pursuant to Section 10(a)(1), forbearance is only appropriate if it can be demonstrated that any regulation or provision of the Act is no longer “necessary to ensure that the charges ... for [its] ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.” To justify forbearance under the first prong, Section 10(a)(1), the RBOCs must prove (a) the existence of actual successful competition in specific markets, including a showing that competitors have deployed extensive facilities capable of delivering high capacity broadband services, and (b) competitors were in fact using such facilities to compete with the ILEC.²³ Under that standard, the RBOCs have failed to demonstrate that they are entitled to forbearance.

The RBOCs have not provided evidence that competitors actually have facilities deployed ubiquitously throughout their regional footprints to such an extent that they can provide

²⁰ 47 U.S.C. § 160(a) (1)-(3).

²¹ *Id.* §160(b) (emphasis added); *see also AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (quoting same).

²² *AT&T v. FCC*, 452 F.3d. at 836.

²³ *See e.g. Omaha Order* ¶¶ 65-66.

services to enterprise customers throughout these regions. This is because competitors continue to rely heavily on RBOC facilities. The facilities underlying the RBOC services purportedly addressed in the RBOC Petitions are provided in their FCC access tariffs. These facilities must remain available in each region at issue to ensure competition in these markets so that customers have the protection of competitive choices. Thus, Section 10(a)(2) is not satisfied with respect to the RBOC Petitions because access to the RBOC facilities remains necessary to protect consumers.²⁴

To support their claims of forbearance under Sections 10(a)(1) and 10(a)(2), the RBOCs must first properly define the market and then carry its burden of providing facts sufficient to establish their claims that they lack market power in the relevant market. The RBOC Petitions fail to do either.

A. The RBOCs Fail to Properly Define the Relevant Market.

The starting point of any market power analysis is the identification of the relevant market. Market power differs based on the type of services and the location of the end user. The Commission has found that “the extent of competitive deployment of high capacity loop facilities can vary tremendously by geographic area. More specifically, the barriers to entry requesting carriers face are most precisely identified on each geographic route serving a particular customer location.”²⁵ A customer in a central business district, for instance, will have competitive options that are unavailable to suburban customers.

The RBOCs, however, consider all customers and all services throughout their entire footprint as being in the same market, and seek broad forbearance without regard to customer type, service or geographic location within the United States. Consequently, the RBOC petitions

²⁴ *Id.*, ¶ 74.

²⁵ *TRO*, ¶ 306.

fall remarkably short of meeting the initial burden of proving that there are competitive choices in all of the markets for which they seek forbearance.

In fact, these petitions reach a new low in disrespecting the Commission's decision-making process. The RBOCs are apparently so confident that "broadband" is now a magic totem that will automatically achieve the desired grant, that they do not even bother to submit a market power analysis that should form the basis of any evaluation of the requirements of Section 10. Instead, they expect the Commission uncritically to accept their assertion that they lack market power in provision of stand-alone broadband transmission services.

Under Section 10, the Commission "cannot assume, that absent [the provision or regulation] market conditions or any other factor will adequately ensure that the charges, practices, classifications and services ... are just and reasonable and not unjustly or unreasonable discriminatory."²⁶ The statute requires the Commission to tailor its forbearance findings to specific markets or specific carriers. Congress directed the Commission to forbear only "in any or some" of the markets where the petitioner shows the forbearance criteria are met.²⁷

This approach is consistent with judicial guidance regarding the appropriate geographic market for assessing entry barriers in the local telecommunications market.²⁸ To assess properly whether a carrier possesses market power, the Commission has found that "the proper market aggregates those consumers with similar choices regarding a particular good or service in the same geographic area."²⁹ The RBOC petitions, however, are long on assumption, and short on

²⁶ 1998 Biennial Regulatory review-review of ARMIS Reporting Requirements, Report and Order, Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, Fifth Report and Order, 14 FCC Rcd 11443 ¶ 32 (1999).

²⁷ 47 U.S.C. § 160(a).

²⁸ *USTA v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002).

²⁹ *WorldCom v. FCC*, 238 F. 3d at 461 citing NYNEX, 12 FCC Rcd. 19,985 ¶ 54.

empirical evidence to support the claims that consumers and the CLEC competitors that serve them have intermodal competitive alternatives. If for no other reason, the Commission should deny the petitions because the RBOCs have failed to identify specific product or customer markets for which they seek relief. In particular, they have failed to identify or separately address voice versus broadband or enterprise versus mass market services.

Assuming the Commission does not simply deny the RBOC petitions, the Commission should ensure that its analysis is limited to the appropriate product market. As it has in analyzing carrier petitions for non-dominant regulatory classification, the Commission should analyze the product market for each stand-alone broadband services using substitutable services. For example, rather than sweep all of RBOCs' broadband service into one product market, the Commission is obligated to consider separately the forbearance petitions for retail business customers and residential customers as well as wholesale services because the services are not substitutable. The Commission's *Advanced Services Report* makes clear that there are differences in the residential and business market that warrant analysis in separate product markets.³⁰

B. The RBOCs Fail to Establish that they Lack Market Power in the Relevant Markets.

Assuming for the sake of argument that the Commission overlooks the RBOC failure to define the relevant market(s), the RBOCs still have the burden of demonstrating that they no longer have market power within each of those markets. As discussed above, however, the RBOCs have completely failed to provide any of the necessary evidence to evaluate competitive conditions in markets for standalone broadband services. And even where the RBOCs have

³⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, (rel. Sep. 9, 2004) (“*Fourth Advanced Services Report*”).

provided some supporting data, their Petitions fall well short of demonstrating the level of competition that the Commission found when it declared other carriers to be nondominant.

The Petitions should be denied because RBOCs retain market power in provision of stand-alone broadband transmission services in provision of both broadband wholesale services to competitors and to retail enterprise customers.³¹ In the vast majority of cases there are no alternatives to RBOC services to competitors for reaching customers or for enterprise customers to obtain needed services.³² And, to the extent there is competition in the retail enterprise market, it is based on last mile access obtained from RBOCs, and therefore could not exist in the absence of regulatory control of RBOC pricing.

Competitors have only built their own last mile facilities to a very small percentage of business customers.³³ This is confirmed by Department of Justice findings in both the AT&T and

³¹ We do not repeat arguments here that RBOCs also retain market power in the residential broadband market because they characterize the services for which they seek regulatory relief as enterprise services. See Comments of McLeodUSA Telecommunications Services, Inc., WC 04-440, filed February 8, 2005 and Comments of CloseCall America, Inc, WC 04-440 filed February 8, 2005 for a discussion of Verizon's market power in the residential broadband market.

³² For example, in the recent *Verizon/MCI Merger Order*, the Commission found that "there is little potential for competitive entry" for the provision of local transmission services. *Verizon Communications, Inc. and MCI Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 39 ("Verizon/MCI Merger Order"). See also *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 149-154 (2005) ("TRRO"), aff'd, *Covad Communications Co. v. FCC*, 450 F.3d 528, (D.C. Cir. 2006), where the Commission found that CLECs "face substantial operational barriers to constructing their own facilities;" that competitors still face "steep economic barriers" to the deployment of last mile facilities; and that these barriers "typically make duplication of such facilities uneconomic."

³³ See WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 citing RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at I-2. Before it merged with SBC, AT&T relied on ILEC loops to serve approximately 95% of its business customers. Reply Decl. of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003)).

Verizon regions.³⁴ The DOJ found that although CLECs could “theoretically,” build their own fiber connections to buildings, this is difficult, time consuming, expensive and depends on a number of factors including revenue opportunities³⁵ This was further reinforced in a recent GAO report that found that competitors have facilities serving fewer than 6 percent of buildings with at least a DS-1 level of demand and about 15 percent of buildings with a DS-3 level of demand.³⁶ Not surprisingly, GAO also found that rates for special access services have increased where they are not regulated, which demonstrates the lack of facilities-based competitive alternatives otherwise needed to constrain such price increases.³⁷

The DOJ and GAO findings are particularly pertinent to RBOCs’ completely unfounded claims of competition in provision of optical OCn level services. OCn level services by their very nature require last mile fiber, and moreover, on both ends of the circuit. Since only a small percentage of commercial buildings have CLEC fiber, it necessarily follows that only a small percentage of those buildings have competitive fiber-based services, so there cannot be sufficient competition to assure that the prices and terms and conditions of optical OCn level and other fiber-dependent (such as Ethernet) services remain reasonable, regardless of the “theoretical “ possibility found in the *TRO* that CLECs can build OCn loops.³⁸ Without competitive fiber, there

³⁴ Complaint of the United States of America in *U.S. v. SBC Communications, Inc. and AT&T Corp.*, Civil Action No. 1:05CV02102, filed October 27, 2005, p. 3-4; Complaint of the United States of America in *U.S. v. Verizon Communications, Inc. and MCI, Inc.*, Civil Action No. 1:05CV02103, filed October 27, 2005, p.3- 4.

³⁵ *Id.* pp. 5-6. *See also* Opposition of MCI, Inc., WC 04-440, filed February 8, 2004, at 6; Comments of Ad Hoc Telecommunications Users Group, CC Docket No. 01-337, filed March 1, 2002 at 14 (both attesting to RBOC market power over broadband services).

³⁶ *See GAO Report* at 12.

³⁷ *Id.* at 12-13.

³⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18

is no record of real competition that would justify the extraordinary remedy of granting private carriage status to services with no real competition. Accordingly, the Commission may not forbear as requested with respect to optical OCn level services (or with respect to the other requested services).³⁹

Although the *Omaha Order* erred insofar as it granted Qwest's request for forbearance from UNE obligations in Omaha, Nebraska, the Commission correctly declined to find Qwest nondominant in provision of high capacity loops and transport even though it also found that Cox was a significant intermodal competitor.⁴⁰ In that decision, the Commission also correctly found that Qwest was the only wholesale provider in Omaha.⁴¹ These findings preclude a grant of the instant petitions.

The Commission has historically identified the dangers of undue concentration in communications markets and used regulatory tools available under the Act to discipline anti-competitive behavior. In the AT&T Non-Dominance Proceedings, the Commission established a standard that dominant carrier regulation remains necessary unless there are least two full-fledged facilities-based competitors offering fully substitutable services, along with other carriers offering less robust competitive services.⁴² The RBOC Petitions fail to respect this long-established Commission precedent and cannot establish that they meet this threshold.

F.C.C.R. 16978 (2003), *corrected by Errata*, 18 F.C.C.R. 19020 (2003), *aff'd in part, remanded in part, vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004) ("*TRO*"), ¶ 315.

³⁹ See also *Time Warner Telecom, Inc. ex parte*, WC Docket No. 06-74, filed August 8, 2006, p. 16.

⁴⁰ *Omaha Order*, ¶ 51.

⁴¹ *Id.*, ¶ 67.

⁴² *AT&T Non-Dominance Order*, ¶ 70.

1. Cable Companies Are Not Yet Competing With RBOC Enterprise Broadband Transmission Services On A Significant Scale

In the place of tangible evidence, the RBOCs refer instead to the aspirational assertions of the cable companies about their intentions to bring competitive services to enterprise customers.

All that the RBOC petitions establish is that somewhere in their respective footprint, some cable provider is offering some kind of broadband service to enterprise customers. Granted, in the densest areas, some third parties are offering alternative fiber-based (mostly backbone) services. However, for the vast majority of enterprise customers, a monopoly still exists and a duopoly is light years away. This degree of market power requires continued vigilance.

Further, cable services are not necessarily substitutes for all RBOC broadband services. Currently, cable companies do not broadly offer high-capacity dedicated loop and transport facilities that can be flexibly tailored by private network users. Unlike PSTN special access services, cable “head-end” oriented networks do not lend themselves to point-to-point applications.⁴³ Hence, even if it is true that the RBOCs are losing market share for retail enterprise services, this is not a reflection of the extent of competitive alternatives to Verizon’s bottleneck loop and transport facilities.

In reality, the RBOCs’ stranglehold hold over many segments of the enterprise market remains unassailed. While the RBOCs refer to the potential for cable companies to provide some competition for some services, they provide no evidence that permits the Commission to gauge

⁴³ Cable systems “do not have the capacity to serve large numbers of business customers requiring ... high speed services.” HAI Consulting, Inc., *The Technology and Economics of Cross-Platform Competition in Local Telecommunications Markets* (dated April 4, 2002), CC Docket Nos. 02-33, 95-20, 98-10, Attachment A to Kelley Decl. of WorldCom Comments (filed May 3, 2002).

the extent of that competition. The RBOCs merely show that cable companies have made general advertisements for offering services to businesses, but without any evidence of the percentage of enterprises within a geographic market that can receive competitive services from a cable company. A cable company's advertising merely demonstrates its willingness, and not necessarily its ability, to serve enterprise customers located within its limited network footprint in that market. The Commission cannot rely solely on aspirational competition to satisfy the Section 10(a) standard.

2. No Other Technologies Currently Provide Viable Competition To RBOC Broadband Transmission Services

Nor are other technologies, such as wireless, satellite, or BPL, adequate substitutes for ILEC wholesale and retail services. According to the FCC's own data, the combined market share for broadband technologies other than cable or DSL has decreased since 1999. These statistics show that fixed wireless and satellite combined now have 1.3% of the market compared to 2.8% in 1999,⁴⁴ and analysts expect little movement upwards.⁴⁵ Other technologies such as WiMAX, mobile wireless and BPL have not been deployed on a generally available commercial basis, if at all.⁴⁶

3. Special Access Is Not A Viable Alternative

In light of RBOCs' market power in provision of broadband and their incentive and ability to discriminate against competitors, regulatory safeguards continue to be necessary in order to

⁴⁴ FCC, *High Speed Services for Internet Access: Status as of December 31, 2003* (June 2004), Tables 1-4.

⁴⁵ See Gartner, Inc., *Consumer Telecommunications and Online Market: United States 2002-2007* (Dec. 2003) at 3.

⁴⁶ See BellSouth, Qwest, SBC, and Verizon report, *Competition in the Provision of Voice Over IP and Other IP-Enabled Services* (May 28, 2004), attached to Letter from Evan T. Leo, Counsel for BellSouth, Qwest, SBC, and Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36 (filed May 28, 2004), at A13.

assure a competitive broadband market. The few competitive providers of ATM, frame relay, and Gigabit services remain wholly dependent on ILEC special access and other services as inputs to their competitive offerings.⁴⁷ The dependence of competitive providers on these inputs enables ILECs to engage in a range of anticompetitive conduct including price squeezes, price discrimination, and poor provisioning. The threat of a price squeeze is very real because in some markets special access prices are higher than the ILEC's retail prices for frame relay and ATM service.⁴⁸

In fact, the Commission's open proceeding reviewing regulation of special access pricing rules shows that RBOCs have been raising prices where they have been granted pricing flexibility.⁴⁹ Accordingly, the Commission may not rely on the availability of special access as justifying the relief requested in the Petitions.

III. THE RBOC PETITIONS FAIL TO SATISFY THE PUBLIC INTEREST STANDARD UNDER SECTION 10(A)(3).

Under Section 10(a)(3), the Commission may forbear from enforcing a regulation or provisions if it is no longer in the public interest.⁵⁰ In previous forbearance orders, the Commission found that the Section 10(a)(1) considerations would be consistent with the public interest under Section 10(a)(3).⁵¹ Given this, it is logical to conclude that, just as the RBOCs have failed to meet their burden on the first two prongs, they also fail on the third.

⁴⁷ Letter to Marlene H. Dortch from Ruth Milkman, Counsel to MCI, Inc., CC Docket No. 01-337, filed May 8, 2003.

⁴⁸ Reply Comments of AT&T Corp., CC Docket No. 01-337, filed April 22, 2002, at 13.

⁴⁹ See e.g. Comments of Ad Hoc Telecommunications Users Group, WC Docket 05-25, filed June 13, 2005 at 16; *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 (2005); *Performance Measures and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 (2001).

⁵⁰ 47 U.S.C. § 160(a)(2).

⁵¹ *Omaha Order*, ¶ 75.

Further, the RBOCs have failed entirely to show that they satisfy the overarching standard of “whether forbearance from enforcing the provision ... will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers of telecommunications services.”⁵²

As these Comments explain, not only will forbearance fail to promote competition, basic economic theory dictates that it will diminish competition by serving to cement a RBOC monopoly that will discourage investment and harm consumers through undisciplined pricing and stifled innovation.

A. BOCs Would Use Private Carriage To Discriminate Against Competitors

By the Pending Petitions, RBOCs seek the ability, not to help their retail and wholesale stand-alone broadband transmission customers, but to impose unreasonable terms and conditions of service on them. RBOCs’ insincerity in this regard is most starkly revealed in their proposal that, although common carriage regulation would be forborne, they would nonetheless be eligible for permissive detariffing.⁵³ RBOCs want to be able to tariff the purported private carriage services so that they may invoke the filed rate doctrine against their retail and CLEC wholesale broadband customers. That doctrine would permit RBOCs to impose prices, terms, conditions on customers without any negotiation of customized offerings whatsoever. RBOCs seek to retain the ability to tariff because they know, as explained above, that in the vast majority of circumstances retail customers have no alternative service providers and CLECs have no wholesale alternatives for last mile access to their customers.

⁵² 47 U.S.C. §160(b) (emphasis added); *see also AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (quoting same).

⁵³ AT&T Petition at 10.

Although RBOCs claim they need forbearance to provide innovative, customized products to their retail customers, they make no such claim with respect to provision of wholesale services to their competitors. In fact, they have strong incentives not to provide customized arrangements or products to their competitors that would help them compete against the RBOCs. As recently explained to the Commission, if a competitor needs a special access arrangement from the RBOC to provide an innovative service, the RBOC can increase its profits by refusing to provide it.⁵⁴

In addition, in the wholesale market, cross-subsidization remains a very real and readily viable strategy for the RBOCs to thwart competition. RBOCs need only price the wholesale rate too high, and make up for this rate to its own long distance operations by accepting lower or no earnings. RBOC private carriage would enable them to consign, with impunity, independent IXCs and CLECs to inferior provisioning and maintenance, as well as charge them unreasonable prices, without regulatory oversight.

The Commission should deny the requested forbearance for the single reason that private carriage would facilitate RBOCs' ability to act on its incentive to discriminate against competitors.

B. RBOCs Have Strong Incentives to Discriminate

RBOCs have especially strong incentives to discriminate against CLECs as CLECs attempt to move into provision of innovative packet-switched, VoIP, and IP-enabled services. CLEC VoIP service will compete with RBOCs' existing local and long-distance offerings, and will also compete with future RBOC VoIP services. The number of incumbent LEC circuit-

⁵⁴ Declaration of Stan M. Besen and Bridger Mitchell, p. 13, attached to Time Warner Telecom, Inc. *ex parte*, WC Docket No. 06-74, filed August 8, 2006.

switched access lines has been in decline.⁵⁵ The market for VoIP services has grown significantly from 2003 through 2Q 2006. VoIP subscribership now exceeds 6.9 million customers,⁵⁶ and is expected to grow to 18 million subscribers by 2009.⁵⁷ While CLEC VoIP services have so far not been a major cause of ILEC line losses, RBOCs have strong incentives to thwart provision of CLEC VoIP by denying or degrading access for competing VoIP services.

Even where packet-switched services do not compete with traditional telephony services, incumbents would have strong incentives to disadvantage competitors in the race to develop and provide the new IP-enabled services, such as video IP. These new markets are a major market opportunity, which RBOCs would like to deny to competitors.

The RBOC petitions to eliminate Title II common carriage obligations are an attempt to limit consumer choice. RBOCs have elsewhere explained that “[c]losing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.”⁵⁸ Yet the RBOC petitions would strengthen their hand to attempt exactly that result. The petitions would give free rein to RBOCs’ ability to harm competitors by permitting them to establish special relationships with their own

⁵⁵ See, e.g., *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

⁵⁶ See “VoIP Central, “US VoIP Subscribers’ Base Grows 21 Percent in Q2,” August 11, 2006, <http://www.voipcentral.org/entry/us-voip-subscribers-base-grows-to-21-percent-inq2/>; Merrill Lynch, *Everything Over IP: VoIP—and Beyond*, at 20 (March 12, 2004) (“*Everything Over IP*”).

⁵⁷ Telecommunications Industry Association, “Number of VoIP subscribers more than Triples in 2005 to 4.2 Million; Expected to Grow to 18 Million by 2009,” http://www.tiaonline.org/business/media/press_releases/2006/PR06-19.cfm.

⁵⁸ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation, (April 8, 2003) at 46 (“Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.”)

IP-enabled operations, deny them to independent providers or even to deny access altogether to alternative providers.

C. Granting The BOCs Forbearance For Their Enterprise Broadband Services Will Retard Innovation

The Commission has invoked the benefits of “innovation” routinely for some years now, albeit without ever having defined what it actually is in the context of local telecommunications service. The Telecom Investors suggest that the Commission should either invest this word with actual meaning or retire it as an overused cliché, since it appears to have degenerated into a catch-all invocation supporting whatever action the Commission is taking at any particular time.⁵⁹

What is particular unfortunate is that, as with investment returns, recent Commission decisions appear to imply that only RBOC innovation is of concern, and that the RBOCs should be granted whatever relief that they claim will spur “innovation,” as if the hopes of the industry rest solely on them. This is quite strange, because the RBOCs are clearly not innovators, but merely buyers of existing technology and appropriators of others’ ideas.

A good working definition of “innovation” is “the act of innovating”; *i.e.*, “to start or introduce something new: be creative.”⁶⁰ Using Verizon as an example, it is hard to come up with any example of Verizon innovation in provision of telecommunications services. Verizon has no research and development organization to speak of, nor does it have a manufacturing operation, notwithstanding its authority to do so subsequent to its relief under Section 271. Verizon was not

⁵⁹ In an informal survey, “innovation” was among the most overused buzzwords, along with “outside the box,” “synergy” and “take it to the next level.” Vickie Elmer, *Can the Clichés*, Washington Post at D2 (Jan. 10, 2007).

⁶⁰ Houghton Mifflin, Webster’s II New College Dictionary 571 (1995).

the first to deploy fiber to the home in its region. RCN, for example, was deploying fiber as early as the late 1990's,⁶¹ at least five years before Verizon began its deployment in 2005.⁶²

With respect to the ILECs generally, one analyst has concluded that,

Unlike every other information technology industry, the ILECs engage in virtually no research and development. With the exception of 1999-2000, their network capital spending has remained flat for over a decade. However, their political spending has increased sharply; they spend up to half a billion dollars per year on lobbying, regulatory efforts, litigation, and political contributions, including multiple legal challenges to the 1996 Act and FCC regulations. They also cooperate extensively in purchasing, investing, litigation, regulatory proceedings, and politics. This pattern appears to be the combined result of rational monopolistic conduct, and of entrenched top managements unwilling to face modern high technology competition. The ILECs' top managements and boards of directors generally contain very little technical expertise.⁶³

More recently, one Verizon Senior Vice President recently explained, “[w]e develop services, and we figure out how to use and deploy technology that many others are developing.”⁶⁴ In that same article, the former President of Science and Technology for Verizon’s predecessor, Bell Atlantic (and former Chief Engineer of the Commission) stated that “[t]hey [Verizon] do very little fundamental research and very little advanced development.... Their view of the world is: ‘We can buy it elsewhere.’”⁶⁵

⁶¹ RCN Corp. 2003 Form 10-K.

⁶² Verizon 2005 Annual Report, available at <<http://investor.verizon.com/financial/annual/2005/feature03.html>>.

⁶³ Charles H. Ferguson, The Brookings Institution, *The United States Broadband Problem: Analysis and Policy Recommendations* 3 (May 31, 2002).

⁶⁴ Mark Gimein, *The Phone Companies Still Don't Get It*, BusinessWeek Online, July 31, 2006 (quoting T. J. Tauke, Executive V.P. - Public Affairs, Policy and Communications, Verizon) (available at <http://www.businessweek.com/magazine/content/06_31/b3995070.htm>).

⁶⁵ *Id.* (quoting Edward J. Thomas).

Perhaps “innovation” is a term that has degenerated into meaninglessness, if it ever had meaning at all. It is one thing to resort to shorthand phrases to refer to certain (presumably) well understood concepts like, perhaps, “unbundled network element” or “long range incremental cost.” It is another thing entirely to use them as a substitute for deliberative thought. Granting the RBOC Petitions will spur innovation only to the extent that it will ensure RBOCs the supra-competitive returns they believe must be ensured in order to keep pace with and acquire the innovations of others. It will send the message that investment should be directed at preserving the status quo, not in innovating. RBOCs are not innovators. Any hope for innovation will be made through competition.

IV. THE RBOCS HAVE THE ABILITY UNDER CURRENT RULES TO ENTER INTO CUSTOMIZED AGREEMENTS

RBOCs contend that they need relief from Title II treatment for stand-alone broadband transmission services to be able to offer innovative, customized services to large sophisticated users.⁶⁶ In doing so, the RBOCs fail to acknowledge, however, that they already have the ability to offer stand-alone broadband service on a customized basis, having offered services through contract tariffs for many years.⁶⁷ These are individually negotiated agreements with customers that are designed to meet the customers’ specialized needs.

AT&T, for example, offers broadband services through its unregulated affiliate SBC-ASI, Inc. The Commission granted SBC-ASI forbearance from application of tariffing rules in connection with its provision of advanced services through a separate affiliate.⁶⁸ The Commission in the *Fast Packet Order* similarly granted Verizon a waiver to provide it the best of all

⁶⁶ AT&T Petition at 4.

⁶⁷ *Access Charge Reform*, 14 FCC Rcd 14221 (1999).

⁶⁸ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002).

possible worlds – the ability to offer its stand-alone broadband transmission services free of price cap regulation but without having to offer them through a separate affiliate and with the pricing flexibility in markets in which Verizon already qualifies for pricing flexibility.⁶⁹ BellSouth chose to include packet switched services within price caps and is able to offer those services pursuant to contract tariffs wherever it has qualified for pricing flexibility.⁷⁰ All of these options remain available to Qwest for offering its stand-alone broadband transmission services. The RBOC claims that forbearance is only avenue available to them for offering individually tailored services to customers are baseless.

Nor is dominant carrier regulation for RBOCs' provision of broadband overly burdensome. If a RBOC wants to avoid dominant carrier regulation it may provide services through a separate affiliate, as AT&T has done. Moreover, since the RBOCs' wholesale broadband services face very little competition, and their CLEC and IXC customers cannot easily switch back and forth between providers for the vast majority of locations, short delays in tariff effective dates have no material effect on a RBOCs' ability to "compete" in the wholesale market.

V. CONCLUSION

For the forgoing reasons, the Commission should deny the Pending Petitions, and should rescind, modify, or clarify its treatment of Verizon's forbearance petition.

⁶⁹ *Verizon Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840, 16844 ¶ 8 (2005), ("*Fast Packet Order*").

⁷⁰ *Id.*, ¶ 7.

Respectfully submitted,

/s/ Andrew D. Lipman
Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

*Attorneys for Columbia Capital and M/C
Venture Partners*

Dated: August 13, 2007